87-1559

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1988

QUESTIONS PRESENTED

1. Under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, is mailed service effective even though the defendant does not return the Form 18-A acknowledgment?

2. Under Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure, is mailed service effective outside the territorial limits of the forum state?

3. After an unsuccessful attempt at mailed service under Rule 4(c)(2)(C)(ii), may a plaintiff make a valid "place of abode" substituted service outside the forum state, on a nonresident of the forum state:

(a) Under Federal Rule 4(d)(1); or

(b) Under the long-arm statute of the forum state (here Colorado)?

4. If a default judgment was void for lack of personal jurisdiction, is that

voidness waived by a postjudgment "voluntary general appearance" seeking relief under Rule 60(b)(1) and (3), for fraud and mistake on the merits, from the Colorado District Court that rendered the judgment, after the defendant (a) has unsuccessfully sought relief on the ground of voidness, from the California District Court where the judgment was registered; and (b) has appealed the adverse ruling on voidness?

[Note: Petitioner reserves the right to argue the following Question 5, but does not include Question 5 among the reasons for granting certiorari.]

5. If out-of-state "place of abode" subtituted service was permitted, was it accomplished here, where (a) it was made on the defendant's estranged wife, after they had permanently separated and he was no longer actually living at her home; and (b) that service never reached him?

LIST OF PARTIES

The only parties to the proceeding in the Ninth Circuit Court of Appeals, and in the California District Court from which the appeal to the Ninth Circuit was taken, were those named in the caption of this Petition. They are Petitioner MASON H. ROSE, V and Respondent SUSAN T. FULTZ, a/k/a SUSAN THERESE FULTZ and SUSAN FULTZ-SMALL.

However, this action originated in the United States District Court for the District of Colorado, whose default judgment was registered in California. In addition to Petitioner, there were two other defendants in the Colorado District Court; both were dismissed at Respondent's request, at or before the entry of the default judgment. They were H. L. QUIST and H. L. QUIST MANAGEMENT AND DEVELOPMENT CORP.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MASON H. ROSE, V, Petitioner

v.

SUSAN T. FULTZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner MASON H. ROSE, V ("Rose") respectfully prays that a writ of certiorari issue to review the judgment and memorandum decision of the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal as moot and was entered on June 10, 1987.

OPINIONS BELOW

The Ninth Circuit's memorandum decision is unreported. It is reproduced, together with that Court's order denying rehearing, in Appendix C.

The order appealed from was the "Order After Contempt Hearing July 15, 1985", of the United States District Court for the Central District of California, where the Colorado District Court's default judgment had been registered. That order is unreported, and is reproduced in Appendix B.

The Colorado District Court's default judgment, and its "Findings of Fact and Order for Default Judgment", are unreported. They are reproduced in Appendix B.

JURISDICTION

Rose seeks review of the Ninth Circuit's memorandum decision, dismissing the appeal as moot; that memorandum was dated and entered June 10, 1987. A timely Petition for Rehearing was denied December 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

The principal provisions involved are (1) the Due Process Clause of the Fifth Amendment to the United States Constitution; (2) Rule 4 of the Federal Rules of Civil Procedure, relating to process, and in particular Rules 4(c)(2)(C) and (D), 4(d)(1), 4(e) and 4(f); (3) Official Form 18-A, the "notice and acknowledgment" referred to in Rule 4(c)(2)(C)(ii), and contained in the Appendix of Forms (to the Federal Rules of Civil Procedure); and (4) Rule 12 of the Federal Rules of Civil Procedure, relating to the presenting and waiver of defenses, and in particular Rules 12(b), (g) and (h). 1/

In addition, a Colorado statute and rule relating to process (Colo. Rev. Stat. sec. 13-1-125, and Colo. R. Civ. P. 4)

1/ References herein to a Rule or Rules, unless otherwise stated, are to Federal Rules of Civil Procedure.

could be relevant, if it is determined that state long-arm service was available after unsuccessful federal mail service.

In the aggregate, the above provisions are too voluminous to reproduce here, so they set forth separately, in Appendix A.

STATEMENT OF THE CASE

Although the present appeal was to the Ninth Circuit from the Central District of California, this case began as a diversity action in the District of Colorado, filed on November 10, 1983 by Respondent SUSAN T. FULTZ ("Fultz"). The jurisdiction of the Colorado District Court was invoked under 28 U.S.C. section 1332, plaintiff Fultz being a citizen of Colorado, defendant Rose a citizen of California, and two other defendants citizens of Arizona. On December 11, 1984, Fultz obtained a default judgment against Rose, from the Colorado District Court, for $464,753.

The jurisdiction of the California District Court was invoked under 28 U.S.C. section 1963, by Fultz' registration of her Colorado judgment in California.

A. Fultz' Attempts to Serve Process

Two attempts at service are relevant here. Fultz first attempted mail service under Rule 4(c)(2)(C)(ii), enclosing Form 18-A; Rose did not acknowledge service. Four days after the mailing, Fultz attempted substituted "place of abode" service on Rose's then wife. Both attempts were made in California (Rose's home state), for an action pending in the Colorado District Court. 2/

2/ The few simple and indisputable facts stated in this paragraph are sufficient to raise the first three of our Questions Presented and (we contend) to mandate a ruling that, as a matter of law, service of process was insufficient. However, additional facts are presented here in support of our contention that it was not only unlawful but unjust to base a default judgment on that service, and to trace the procedural history that compels a conclusion that the appeal is not moot.

Fultz' attempt at service by mail was made on February 16, 1984. On that date, she sent copies of the summons and complaint, and the other items provided for in Rule 4(c)(2)(C)(ii) (two copies of Form 18-A, and a stamped envelope), certified mail, return receipt requested, addressed to Rose at his office in California (CR 19, Ex. C at 2; CR 25, Rose Decln. at 2).

On February 21, 1984, the mailing arrived at Rose's office and was receipted for by the secretary of another attorney in Rose's suite (CR 25, Rose Decln. at 2-3). However, it did not reach Rose, and he was unaware of it, until several days after March 14, 1984, the date on which Rose returned to California from a six-week trial in Kentucky (Id. at 2-3). 3/

3/ The action was filed on November 10, 1983), so both the 120-day period after filing (Rule 4(j)) and the 20-day period after mailing (Rule 4(c)(2)(C)(ii)) had expired before the papers reached Rose.

Form 18-A led Rose to believe that as yet service had not been completed and he had no duty to defend, because he had not returned the acknowledgment, and he had not even received the papers within the 20-day period for return specified in the form (CR 25, Rose Decln. at 3). Form 18-A --particularly the paragraphs that began respectively "If you do not complete and return the form" and "If you do complete and return this form" (App. A at 7a)-- further led Rose to believe that, by not returning the acknowledgment, he only risked liability for the cost of service "in any other manner permitted by law", not a default judgment (Id. at 3-4). 4/

4/ We do not suggest that there was anything unusual in Rose's reading of Form 18-A, or in his belief that service had not been completed. On the contrary, we will show below that Rose's reading of the form was correct, and was the same as that of the Third Circuit, Fourth Circuit and D.C. Circuit Courts of Appeal.

Fultz' attempt at substituted "place of abode" service was made on February 20, 1984. On that date, according to the return of service executed by process server Ron Hughes, Rose was served "by substituting service on his wife . . . by leaving copies with her at place of residence which is 37 Crest Road West, Rolling Hills California (CR 19, Ex. B at 2; emphasis added). Hughes was "a private investigator and process server," employed by counsel for Fultz to serve Rose (CR 19, Ex. A at 1). He was not one of the class of persons (such as sheriffs) authorized by the Colorado Rules to serve process outside the state (Colo. R. Civ. P. 4(d)(2), App. A at 13a).

The papers served on Mrs. Rose never reached Rose, and he was not aware of the attempt at substituted service until some time after the default judgment (CR 25,

Rose Decln. at 4). [5/]

On the date of that service, February 20, 1984, Rose was no longer actually living at Mrs. Rose's residence. On that date, (1) he was living temporarily with Emma Faulk in Lexington, Kentucky (where he was engaged in a trial); and (2) his permanent home and usual place of abode was with Ms. Faulk at her home in Palos Verdes Peninsula, California.

B. The Colorado Default Judgment

Rose did not appear in the Colorado District Court at any time prior to the default judgment. On Fultz' motion, the

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[5/] There is conflicting evidence in the record as to whether Mrs. Rose was served at all; she denied having been served (CR 16, Mrs. Rose Decln. at 1-2; CR 25, Rose Decln. at 4). For purposes of this petition (as we did for the appeal below), we will assume that Mrs. Rose was served. On the other hand, there has been no evidence that the papers served on her ever reached Rose. Because of the hostility of their separation, it is unlikely that she would have delivered the papers to him or told him about them, and in fact she did not (CR 25, Rose Decln. at 4-6).

Colorado Court set a default hearing. As ordered by the Court, Fultz notified Rose of that hearing, and sent him copies of her filings for the hearing.

Rose still did not appear, and on December 11, 1984, the Colorado Court entered a default judgment against him, awarding Fultz about $465,000 (including $116,000 of compensatory damages, $148,000 of punitive damages,[6/] and a few hundred dollars in costs), based on claims of personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

Since he had not appeared in Colorado,

6/ In setting punitive damages at $348,000, the Colorado Court (App. B at 40a) "deem[ed] it necessary to forego the customary measure of such damages, and to adopt [the antitrust] standard of trebling the compensatory damages to Plaintiff in awarding punitive damages." But by setting the punitive damages alone at three times compensatory damages, the court awarded an overall judgment of four times compensatory damages, instead of three times as in antitrust.

Rose's jurisdictional contentions were not litigated there before judgment. Based solely on Fultz' representations, the Colorado court found she had served Rose by registered mail on February 16, 1984, and by substituted service on February 20, 1984 (Findings 3 and 2, App. B at 26a). However, in concluding service was proper, the court made specific reference only to the mail service Rule 4(c)(2)(C))(ii), as follows (Conclusion 1, App. B at 36a):

> 1. That service of process upon the Defendant Rose, in each instance, was proper and in full comportment with Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP.

C. The 7/15/85 California Ruling on Voidness, Rejecting Rose's Contention That He Was Not Properly Served

On January 17, 1985, Fultz registered her Colorado default judgment in the California District Court. She did so under 28 U.S.C. Section 1963, "by filing therein a certified copy of such judgment" (Rose's Excerpts of Record in Appeal No. 85-6202,

Item M 1, "Certification of Judgment for Registration in Another District"). [This detail should be superfluous, but the Ninth Circuit does not recognize that the appeal was from a registration proceeding, incorrectly stating (App. C at 45a-46a) that "Fultz filed an action in the [California] District Court . . . to enforce her Colorado judgment against Rose."] 7/

Rose's first appearance--in any court--in this litigation was in California on April 15, 1985. Beginning with that first appearance, and continuously thereafter until the California court rejected his jurisdictional objection, Rose made it clear that he was appearing only for the purpose of contesting jurisdiction. His

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7/ This is one of several incorrect statements of facts or dates in the Ninth Circuit's decision. Although these errors are probably of no major importance, we will state the facts accurately, and point out the error in brackets as we do here. If any of these differences should become material, the accuracy of our version can easily be verified from the record.

first words to the California Court were "Yes. Mason Rose specially appearing pro per." (4/15/85 RT at 4). His first written submission, that same day, was a "Special Appearance by Mason H. Rose, V to Object to This Court's Exercising Jurisdiction Over His Person" (CR 7). 8/

Rose followed that first submission nine days later with a more formal motion to set aside the Colorado judgment "for Lack of Personal Jurisdiction" (CR 16), which was denied in the order appealed from, on July 15, 1985 (App. B at 22a).

Rose's first appearance was a response to Fultz' attempt to cite him for contempt for failing to appear for a debtor deposition. The California court rejected the contempt citation, but ordered Rose to be deposed the next day (CR 8). Although he

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8/ Rose, like the Ninth Circuit, was not aware that the Federal Rules had abolished the age-old distinction between general and special appearances.

attended the deposition as ordered, Rose refused to answer questions other than on personal jurisdiction (CR 25 at 5-6).

As a result, Fultz filed a second contempt motion. Rose opposed it, on the ground that, because of improper service, the Colorado default judgment was void and both courts lacked jurisdiction, so he could not be punished for contempt of a void order.

In opposing contempt, Rose asserted both basic defects in service that he relies on here. First, although the mail service gave him notice of the Colorado action, Official Form 18-A told him he had not yet been served and had no duty to defend, because he did not return the acknowledgment (CR 25, Rose Decln. at 3-4). Second, Rose argued neither Federal Rules nor Colorado Rules permit out-of-state mailed or substituted service (CR 25 at 13-15; CR 27 at 3-8).

Although the California Court was reluctant to rule on the jurisdiction of the Colorado Court, at the contempt hearing both parties agreed to that determination (CR 25 at 10-13; CR 27 at 8; 7/15/85 RT at 6), which the California Court proceeded to make, albeit without any independent consideration of the issues.

At the hearing, the California Court said it was ruling there was jurisdiction in Colorado, "based on the finding of the Colorado Court," because "I don't think that this court should set aside judgments made by a sister court that has already looked at the issue that is involved in this hearing" (7/15/85 RT at 20, 22).

On July 15, 1985, in the order appealed from, the California Court (1) found Rose in contempt of the order for his deposition, and fined him; and (2) denied Rose's motion to set aside the Colorado judgment (App. B at 22a). Both of those rulings

were squarely based on the California Court's conclusions that service of process was proper and the Colorado Court had jurisdiction, as follows (App. B at 21a):

> 1. That substituted service of process upon a non-resident outside the boundaries of the State of Colorado is an authorized procedure under Colorado State statutes, rules and decisions.
>
> 2. That substituted service of process pursuant to Rule 4(d)(1) F.R.C.P. and Section 13-1-125 C.R.S. 1981 Supp. was valid and proper, thereby granting in personam jurisdiction over the Defendant Rose by the United States District Court, District of Colorado, Honorable Richard P. Matsch, Judge Presiding.
>
> 3. That in all respects the default judgment rendered against the Defendant Rose by the Colorado federal court was valid and proper.

On August 13, 1985, Rose filed a timely Notice of Appeal to the Ninth Circuit (CR 34), from the California Court's 7/15/85 order "in its entirety, including but not limited to those portions" that denied his motion to set aside the Colorado judgment, and found him in contempt.

Rose invoked the Ninth Circuit's jurisdiction under 28 U.S.C. Section 1291, asserting (Opening Brief at 5) the 7/15/85 order appealed from fully disposed of all claims, by denying his motion to set aside the Colorado judgment and finding him in contempt, both based on full and final rejection of his jurisdictional claims.

Thus Rose's objections to jurisdiction had been raised, ruled on adversely and appealed, months before he first appeared in Colorado on December 11, 1985. [9/]

[9/] Rose unsuccessfully sought reconsideration of the California ruling on jurisdiction, in a Rule 60 motion based on (1) Fultz' misrepresenting that the Colorado Court had considered, and based its ruling on, Colorado law; and (2) denial of due process by refusing to reconsider jurisdictional rulings made by the Colorado Court in Rose's absence. The California Court summarily denied Rose's motion by minute order (CR 49) on December 9, 1985 [not December 18, so Rose was not still "pursuing his Rule 60(b) motion in the California district court" (cf. App. C at 3) when he filed in Colorado 12/11/85]. That ruling, and the appeal from it, do not affect the questions presented here, so we will not discuss them further.

D. Rose's 12/11/85 Colorado Rule 60 Motion

On December 11, 1985, Rose filed a Rule 60 motion in the Colorado District Court. Rose's filings in Colorado were months after the 7/15/85 order appealed from here, so they are not part of the record in that appeal. However, those filings were properly placed before the Ninth Circuit by both parties in connection with Fultz' motion to dismiss the appeal as moot. 10/ See County of Dakota v. Glidden, 113 U.S. 222, 225 (1885) ("all courts are [compelled] to receive evidence dehors the record affecting their proceeding in a case before them on error or appeal").

10/ Those filings were the basis of the Ninth Circuit's decision that they constituted a "voluntary general appearance" by Rose in Colorado, thereby waiving improper service and mooting the Ninth Circuit appeal (App. C at 50a-52a). They are central to Rose's attack on the Ninth Circuit decision, and to his standing to continue his claim of improper service here. Accordingly, the Colorado Rule 60 motion in its entirety, and relevant excerpts from Rose's other Colorado filings, are set forth in Appendix D.

The caption and preamble of the motion (App. D at 55a-56a) specified the subdivisions of Rule 60 under which Rose sought relief from the default judgment--60(a) for clerical mistake, 60(b)(1) for mistake and 60(b)(3) for fraud and misrepresentation. Rose specified eleven numbered grounds for relief (App. D at 57a-68a), including two relating to service of process (Grounds 9 and 10, App. D at 66a-67a), Ground 11 relating to the facts of Fultz' claim, and the remainder relating to mistakes and misrepresentations as to punitive damages.

Rose's motion was primarily aimed at reducing or eliminating the $348,000 of punitive damages. To that end, he offered "to confess judgment for compensatory damages alone" (App. D at 69a; emphasis added) [the Ninth ciruit incorrectly called this a "confession of liability to compensatory damages" (App. C at 50a)]. It was an offer

to "waive all defenses and counterclaims against [Fultz]" (Rose 12/11/85 Affidavit at 3) and confess judgment for compensatory damages alone, thereby eliminating punitive damages entirely and settling the entire matter. When that offer was not accepted, and Fultz used it against him, Rose withdrew it. 11/

The Ninth Circuit (App. C at 50a) correctly states that "Rose informed the Colorado court that he was challenging the jurisdiction of that court to [the Ninth Circuit], . . ." However, Rose did much more than that. He provided the Colorado Court with the same evidence of defective

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11/ Since the filings that were submitted to the Ninth Circuit, the Colorado court has denied Rose's Rule 60 motion, and he has appealed it to the Tenth Circuit. Because the Ninth Circuit vacated the 7/15/85 California Order (App. C at 52a), it may now be possible for Rose to get a ruling on jurisdiction in Colorado. However, Rose contends he was entitled to that ruling in California, and that this Court should rule on it here.

service that he relies on here, in considerable detail (12/11/85 Rose Affidavit, App. D at 69a-77a). He asserted his "contention in . . . other proceedings that the default judgment is patently void for lack of personal jurisdiction over Rose, because there was no valid service of process" (App. D at 78a); he then proceeded to briefly summarize a primary legal basis for that contention, citing Federal Rule 4(f), two federal cases, a Colorado rule and two volumes of a Colorado text.

Rose further advised the Colorado Court that he was making his 60(b)(1) and (3) motions then, without waiting for a ruling on voidness, only because of the one-year limitation on motions under those subdivisions (App. D at 57a, 79a). The motions were filed on the last day of that one-year period.

In two of his three Colorado filings in December 1985, Rose made it clear that his

12/11/85 Colorado motion was intended to be in addition to, not instead of, his continued attacks on jurisdiction (App. D at 56a-57a, 78a). For example, Rose's 12/11/85 Brief said (App. D at 78):

> This motion is supplementary to two other proceedings, one pending and one contemplated within a few days, in which Rose asserts that the default judgment is void. The pending proceeding is an appeal to the Ninth Circuit Court of Appeals, from a contempt order of the California District Court where the judgment was registered. The contemplated proceeding is a motion to be made in this Court, under Rule 60(b)(4), to set aside the default judgment.

Rose did not file a 60(b)(4) motion in the Colorado court within a few days, as he had contemplated. Instead, he advised the Colorado Court (App. D at 81a-82a) that he was deferring that motion until after the ruling of the Ninth Circuit, "because further research convinced us that the only remedy to which we were entitled as of right was in pursuing the appeal that we had already filed in the

Ninth Circuit." 12/

Although Rose put the facts and a summary of the law relevant to jurisdiction before the Colorado Court in December 1985, it is true that he did not then ask the Colorado Court for a ruling that the default judgment was void for lack of jurisdiction. He did not do so then, because his research showed that he could not do so while the 7/15/85 California Order was still in effect.

E. The Ninth Circuit's Mootness Ruling

The Ninth Circuit's 6/10/87 Memorandum decision ("the Memorandum"; App. C at 43a-53a) vacated the 7/15/85 California Order and dismissed the appeal as moot.

12/ The details of that "further research" were not spelled out in Rose's Colorado brief. The research showed (as will be discussed in a later section) that in federal courts (unlike the rule in many states, including California) an order or judgment of a district court has res judicata or collateral estoppel effect even though it has been appealed, unless and until it is reversed or vacated.

The Ninth Circuit held that Rose's Rule 60 motion in Colorado was "a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction" (App. C at 50a; emphasis added). The Ninth Circuit continued (Id. at 50a-51a; emphasis added):

> Furthermore, Rose waived the defect of lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson [v. Hayakawa (9th Cir. 1982)], 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987)(general appearance by defendant failing to dispute personal jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Thus the Ninth Circuit held that Rose lost his right to appeal the 7/15/85 California Order, not because he failed to make timely objection to jurisdiction, but because he made a "voluntary general appearance" by failing to raise that issue

again in Colorado, after he had already raised it, lost it and appealed it in California.

F. Chronology Table

The following is a table showing the sequence of events that are central to the questions presented here:

11/10/83: Fultz files this diversity action, in the Colorado District Court.

2/16/84: Fultz mails process, including Official Form 18-A, to Rose's office in California, attempting service under Rule 4(c)(2)(C)(ii). The papers reached Rose about a month later, but he never returned the acknowledgment.

2/20/84: Fultz attempts substituted "place of abode" service on Rose's estranged wife, at the residence they had shared in California.

12/11/84: Fultz obtains default judgment against Rose in Colorado, for $465,000, including $348,000 of punitive damages.

1/17/85: Fultz registers her Colorado default judgment in the California District Court.

4/15/85: Rose appears for the first time, in California, appearing "specially" to contest jurisdiction, claiming improper service of process.

4/24/85: Rose files motion to set aside the Colorado judgment, in the California Court.

7/15/85: The California Court denies Rose's motion to set aside the Colorado judment, and finds him in contempt of a discovery order, both based on a ruling that service had been proper and the Colorado Court had jurisdiction.

8/13/85: Rose files a timely Notice of Appeal from the 7/15/85 California Order, to the Ninth Circuit Court of Appeals.

12/11/85: Rose appears for the first time in the Colorado District Court, filing a Rule 60 motion, asking for relief from the default judgment under Rules 60(a), 60(b)(1) and 60(b)(3). He presents evidence of improper service to the Colorado Court, and advises that Court of his challenge to jurisdiction in California, but he does not ask the Colorado Court for a ruling on his jurisdictional challenge.

6/10/87: The Ninth Circuit dismisses Rose's appeal from the 7/15/85 California Order as moot, and vacates the order, ruling that Rose made a "voluntary general appearance" in Colorado by not challenging jurisdiction again in Colorado when he made his Rule 60 motion.

12/17/87: The Ninth Circuit denies Rose's timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

This case is an urgently-needed opportunity for the Supreme Court to answer three major questions on service of process that have divided the federal courts. Those questions relate to unacknowledged mail service, out-of-state mail service, and the availability of state methods of service after unsuccessful federal mail service.

The 1983 amendments to Rule 4 achieved their goal of reducing the workload of the United States Marshals. However, they failed in their other primary objective, which was to provide an inexpensive, simple and easy-to-prove sērvice by mail, as an alternative to personal service. Instead, too often the result has been conflict and confusion.

Because of the conflicts among the circuits, whether service has been completed depends on which circuit's law controls.

The confusion may be even worse where the circuit's court of appeals has not yet spoken and a district court is free to choose for itself. In one horrible example (there are others), two courts of the same district reached opposite conclusions in the same month. Compare Zisman v. Sieger, 106 F.R.D. 194, 200 (N.D. Ill. 1985) with Excalibur Oil, Inc. v. Gable, 105 F.R.D. 543, 545 n. 5 (N.D. Ill. 1985).

In an alarming number of cases, the parties cannot know whether service has been completed until it is too late, and they must blindly make critical decisions at their peril. A wrong choice can risk dismissal for a plaintiff, or (as here) default for a defendant.

Some commentators say the situation is hopeless, and cannot be resolved without further amendments to the rules. See, e.g., Davies, Report on Service of Process by Mail, 116 F.R.D. 169, 178 (1987):

> Yet contrary to that purpose [of the Federal Rules, "to secure the just, speedy, and inexpensive determination of every action"], and to the intended uniformity of practice under the Federal Rules, that same mail provision, fraught with ambiguities, has itself generated much litigation and many conflicts among district, and even circuit, courts. Since neither a consensus among the federal courts nor consideration by the Supreme Court of these problems would appear likely, they must be remedied by amendments to the Rules themselves. 13/

On the other hand, according to 4A C. Wright and A. Miller, Federal Practice and Procedure: Civil 2d Section 1092.1 (1987), "Service under the new provision [for service by mail] should present few problems." Mail service should present few problems, but Supreme Court guidance is needed before that ideal becomes reality.

13/ See also Sinclair, Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c), 73 Va. L. Rev. 1183 (1987); Jarvis and Mellman, Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure: From Hapless to Hopeless, 61 St. John's L. Rev. 1 (1986); Crowley, Rule 4: Service by Mail May Cost You More Than a Stamp, 61 Ind. L. J. 217 (1986).

The present uncertainty might be less objectionable on a more esoteric issue. On an issue as all-pervasive as service of process, that uncertainty is intolerable.

A. Review is Needed to Resolve the Conflict Among Circuits on the Question of Unacknowledged Service by Mail.

1. There Is Conflict Among the Circuits.

The is an apparently irreconcilable conflict among the circuit courts of appeals as to whether mail service under Rule 4(c)(2)(C)(ii) is effective even without acknowledgment. A majority, made up of the Third, Fourth, Fifth, Sixth and D.C. Circuits, concludes unacknowledged service is not effective. A minority of one or two--the Second, and perhaps the Tenth--hold that it is effective. We here list relevant cases, by circuit.

Second Circuit: Morse v. Elmira Country Club, 752 F.2d 35, 39 (2d Cir. 1984) was a statute of limitations case, but nevertheless is a square holding that Rule 4 mail

service is effective on receipt, whether or not it is acknowledged. According to Morse, the second personal service provided for in the rule is not needed to complete or substitute for the mailed service, but only to enable the plaintiff to make proof of service.

Third Circuit: Stranahan Gear Co., Inc. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986) expressly disagreed with the Second Circuit in Morse, and chose to follow the Fourth Circuit in Armco, concluding that "If an acknowledgment is not returned, the formal requirements of mail service are not met and resort must be had to personal service." In Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 879-82 (3d Cir. 1987), the Third Circuit again disagreed with Morse, concluding personal service is required to effectuate federal mail service if defendant fails to acknowledge within the designated time.

Fourth Circuit: Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1088-89 (4th Cir. 1984) held a default judgment based on unacknowledged mail service was void, as the effectiveness of federal mail service is dependent on an appropriate response by defendant on the Notice and Acknowledgment Form 18-A.

Fifth Circuit: Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728, 730 (5th Cir. 1985) held that "Rule 4(c)(2)(C)(ii) is an integrated procedure for establishing and proving in personam jurisdiction as well as service of process, and defendant's return and acknowledgment are an essential part of that procedure.

Sixth Circuit: United States v. Gluklik, 801 F.2d 834, 836-37 (6th Cir. 1986) says the courts, consistent with the legislative history, "have held that the defendant's failure to acknowledge service renders such service invalid, . . ." (listing

citations, with a "But see" citation of Morse). However, Gluklik holds the service was valid because the defendants had agreed to accept it in return for vacating the default judgment.

Tenth Circuit: Kitchens v. Bryan County National Bank, 825 F.2d 248, 255-56 (10th Cir. 1987) seems to say that service was proper under Rule 4(c)(2)(C)(ii), even though no notice and acknowledgement or return envelope was included; it is not clear from the opinion whether that is a dictum or an alternative holding to the main holding that Oklahoma law was complied with. Kitchens does say that the service complied with the spirit, if not the letter of Rule 4, and that "'the federal courts generally take a permissive attitude towards the mechanism employed for service when defendant actually receives notice.'"

D.C. Circuit: Combs v. Nick Garin Trucking, 825 F.2d 437, 443-48 (D.C. Cir. 1987) reversed a default judgment as void, expressly disagreeing with the Second Circuit in Morse, and joining "with the Third and Fourth Circuits in holding that if a plaintiff elects to utilize the federal mail service rule and the defendant does not return the acknowledgment within the designated period, the mailing cannot stand as effective service of process simply by treating it as made in accordance with a state-law method that otherwise might be available." [Omitted footnotes cite Stranahan and Armco].

These cases establish that there is a conflict, and the most recent of them correctly concludes that:

> [T]hese decisions cannot be squared; they reflect antithetical readings of Rule 4(c)(2)(C)(ii), and we must consider each carefully before making any choice between them. Combs, 825 F.2d at 446.

The Supreme Court should make that choice.

2. Notice of the Action Is Not Enough; the Defendant Must Also Be Notified That He Has Been Served and Brought Into Court.

There is an unfortunate tendency to refer to notice of the action as the purpose of service of process. That overlooks a second essential element of proper service--the assertion of jurisdiction.

> The primary function of Rule 4 is to provide the mechanisms for bringing notice of the commencement of an action and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. 4 C. Wright & A. Miller, Federal Practice and Procedure (1969) Section 1063; emphasis added.

This second function was recognized recently in Omni Capital International v. Rudolf Wolff & Co., Ltd., ___ U.S. ___, 108 S.Ct. 404, 409 (1987):

> "[S]ervice of process is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."

There is much less ritual and formality in service today, but it is still essential to let the defendant know that he is

being brought into court, as well as that the action has been commenced.

A leading case frequently cited for liberal construction in finding proper service is Rovinski v. Rowe, 131 F.2d 687, 689 (6th Cir. 1942). That opinion quoted with approval from the district court's statements that "the question of service must be resolved by 'what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint'", and its analysis in terms of "a person knowing that he has been asked to come into court to answer to some complaint against him for damages."

Thus even under the liberal construction that prevails under the Federal Rules, it is still essential that the defendant be notified that he is being served, so he will know that he has been brought into court.

3. Form 18-A tells a defendant he has not been served if he does not return it, so an ensuing default judgment is fundamentally unfair.

Instead of telling the defendant that he has already been served and brought into court, whether or not he acknowleges service, Official Form 18-A tells him just the opposite, in these two paragraphs (App. A at 7a):

> If you do not complete and return the form to the sender within 20 days, you . . . may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.
>
> If you do complete and return this form, you . . . must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Thus Form 18-A tells a defendant he has two choices. He can return the acknowledgment, but if he does he must answer the complaint within 20 days or face a default judgment. His other choice is not to acknowledge service, in which case he may be

required to pay for another attempt at service, but he does not risk a default judment.

In the courts below, Fultz has accused Rose of misreading Form 18-A. However, it is Fultz who has misread the form. So far as we are aware, every court that has considered this issue has interpreted the form to mean what it did to Rose. We set forth here the interpretations of the three courts of appeal that have done so.

According to Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1089 (4th Cir. 1984):

> [T]he notice [Form 18-A] told them that they need do nothing if they did not accept and acknowledge service, though they might be required to pay the cost of service by some other means.

According to Green v. Humphrey Elevator and Truck Co., 816 F.2d 877, 882 (3d Cir. 1987) (emphasis in original):

> Rule 4(c)(2)(C)(ii) expressly incorporates, for the purpose of defendant

> acknowledgment of receipt, official Form 18-A. That form, in turn advises the defendant that the only consequence of failing to return the acknowledgment form is that s/he may be required to pay the expense of alternative service.

The most recent and most detailed explanation is that of Combs v. Nick Garin Trucking, 825 F.2d 437, 443-44 (D.C. Cir. 1987) (footnotes omitted; emphasis in original):

> The unmistakable meaning of this provision [the second sentence of Rule 4(c)(2)(C)(ii)] is that if a defendant does not return the notice of acknowledgment, the plaintiff must make a second attempt to secure service on that defendant if he is to be further pursued in the litigation.
>
> This reading is bolstered by two factors. . . . Second, only this reading of subdivision (ii) is consistent with the text of the form that must be sent to defendants when federal mail service is undertaken. The form warns defendants that failure to return an acknowledgment may result in liability for the cost of alternative service, again without so much as a hint that such failure could expose the defendant to default or default judgment. Indeed, the form indicates plainly enough that the only course of conduct which might give rise to judgment by default is the failure to file an answer within twenty days after returning the form.

Nor is there any conflict with Morse on this interpretation of Form 18-A. Although Morse conflicts with all three ciruits just quoted on the effectiveness of unacknowledged service, in Morse the Second Circuit was not required to interpret Form 18-A because of a typing error.

> By what appears to be a transcription error, plaintiff's form reads: "If you do not complete and return this form . . . ." We are very reluctant to nonsuit a plaintiff for so minor and obviously incorrect a deviation. Rule 4(c)(2)(C)(ii) supports this conclusion, since it requires only substantial compliance with the form, and not an absolutely perfect rendering. Moreover, plaintiff's error should have made defendant more alert than would the version contained in the form; this is not a case in which a deviation from the form lulled the recipient into inaction. . . . This single, minor, apparently unintentional deviation, which had no significant impact on defendant's conduct, is not ground for voiding the mail service. Morse, 752 F.2d at 41-42 (emphasis in original).

By contrast, the correct Form 18-A does lull the recipient into inaction, and it did so here. For the courts to deceive a defendant, by awarding a default judgment

against him after leading him to believe he has not been served, is so fundamentally unfair as to deny due process of law. It is equally unfair to use the "actual notice" of the mail service (as Fultz did successfully in the California District Court) to validate a substituted service that never reached Rose.

B. Review is Needed to Resolve Conflicts Among Federal Courts, With Each Other and With the Recent Omni Decision of This Court, on Out-of State Service.

Both the Colorado and California District Courts relied on Federal Rule 4 service (instead of or in addition to Colorado long-arm service) to validate Fultz' attempts to serve Rose in California for a diversity action in Colorado.

The Colorado Court concluded service was proper under "Rule 4 FRCP and, specifically, Rule 4(c)(2)(C)(ii) FRCP" (App. B at 36a). The California Court concluded that Fultz' substituted service satisfied both "Rule 4(d)(1) F.R.C.P. and [Colorado]

Section 13-1-125 C.R.S. 1981 Supp." (App. B at 21a)

Both Courts ignored the problem of out-of-state service under Federal Rule 4. That question has divided federal courts since the 1983 amendments, but hopefully it has been answered now--against Fultz--by this Court's decision in Omni Capital International v. Rudolf Wolff & Co., Ltd., ___ U.S. ___, 108 S.Ct. 404 (1987). We say "hopefully" because Omni arose under a federal statute, and it may be necessary for this Court to establish here that the same principles apply to diversity actions.

We will only briefly refer to the pre-Omni situation. It had been established that out-of-state [illegible]uted service was not available under Fed.R.Civ.P. 4(d)(1). Davis v. Musler, 713 F.2d 913 (2d Cir. 1983) ("When read in light of Rule 4(f), it is clear that Rule 4(d)(1) applies only

when a complaint is served within the territorial limits of the state in which the district court where the action is pending sits.").

However, the situation was muddled on the availability of out-of-state mail service under Rule 4(c)(2)(C)(ii). There were plenty of decisions, and most held it was not available, but virtually all of them were district court decisions, so a definitive answer was not possible. As pointed out in M. Davies, Report on Service of Process by Mail, 116 F.R.D. 169, 171 (1987):

> [T]he majority of courts which have addressed the issue have held that, where state law is relied upon to permit extraterritorial service, mail service under Rule 4(c)(2)(C)(ii) is not available; a state method of service must be used. However, other courts have held to the contrary. This dispute has taken on added importance since a decision by one court, . . . that the improper use of mail service to serve a defendant out of state precludes that plaintiff from ever obtaining effective service out of state. [Footnotes omitted; emphasis in original].

The 1983 amendments to Rule 4 were enacted by Congress, which had rejected changes submitted to it by the Supreme Court. See, e.g., id., 116 F.R.D. at 169-70. The same principles should apply to this enactment of Congress as to the federal statute in Omni (of course, principles of interpretation do not depend on the enacting body, so it should not matter whether the amendments were written by Congress or the Supreme Court).

Service of process in federal actions is covered generally by Rule 4. Omni, 108 S.Ct. at 409. Rule 4(f) describes where it may be served, authorizing service in the state where the action is brought, or anywhere else authorized by a federal statute or by the Rules. Id. at 410. In diversity actions, that limits the search to the Rules, and the obvious reference is to Rule 4(e). In the absence of a federal statute (as here), that means resort must

be had to the state long-arm statute. Cf. Ibid.

Thus out-of-state service is not available under Rule 4(c)(2)(C) or 4(d)(1), except as expressly provided in subdivision (i) of Rule 4(c)(2)(C). That excludes mail service under 4(c)(2)(C)(ii). The drafters of the rule knew how to authorize nationwide service when they wanted to provide for it. Cf. Id. at 411. The courts are not free to fill in the gaps. Cf. Id. at 412-13.

Perhaps the federal courts will perceive the connection, between Omni and the problem of nationwide mail service, without further guidance from the Supreme Court. If so, it might be sufficient to dispose of this case summarily, to bring it into line with Omni. However, we strongly urge guidance from this Court now, particularly since it overlaps the troublesome question we address next.

C. Review is Needed to Resolve the Conflict Among Circuits on the Availability of Long-Arm or Federal Out-of-State Service After Federal Mail Service Has Failed.

Here we are faced with irreconcilable conflicts on two levels. First, is state long-arm service available after mail service is unsuccessful? Second, is federal out-of-state Rule 4(d) service available in that situation?

On the first question, there is a conflict among the circuits, in their interpretation of the second sentence of Rule 4(c)(2)(C)(ii), which provides (App. A at 2a-3a; emphasis added):

> If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

In Armco, Inc. v. Penrod-Stauffer Bldg. Systems, 733 F.2d 1087, 1089 (4th Cir. 1984), the Fourth Circuit held that:

> Once service is attempted under Rule 4(c)(2)(C)(ii), service of process in accordance with state law, as otherwise authorized by 4(c)(2)(C)(i), is not permissible.

In Humana, Inc. v. Jacobson, 804 F.2d 1390, 1393 (5th Cir. 1986), the Fifth Circuit expressly disagreed with the Fourth Circuit in Armco, and applied the reasoning of the Second Circuit in Morse. Humana refused to interpret literally the word "shall" (emphasized above in our quotation of the second sentence of subdivision (ii)), and proceeded to hold that a second mail service in accordance with state law was valid despite plaintiff's initial reliance on federal mail service.

In Combs v. Nick Garin Trucking, 825 F.2d 437, 445 n. 76 and 77 (D.C. Cir. 1987), the D.C. Circuit described the conflict and disagreed with the Fifth Circuit in Humana, but distinguished Humana (825 F.2d at 444 n. 55), because "The mode of a

in Humana, but distinguished Humana (825 F2d at 444 n. 55), because "The mode of a second effort to effect service is unimportant here, since there was no subsequent attempt to serve."

This question is particularly troubling to the courts, because it is difficult to perceive a logical reason for the mandatory "shall" that (if taken literally) precludes one of the two alternatives that were originally available. See, e.g., Combs, 825 F.2d at 437 n. 98:

> While the rule, by its terms, clearly calls for personal service following a failed attempt to utilize federal mail service, . . . we confess to some uncertainty as to why Congress desired to foreclose otherwise permissible methods of service merely because the plaintiff initially elected to use the federal rule.

Obviously, there is a strong temptation to fill in the gaps, something which the Supreme Court forbade (albeit in a different context) in Omni. That temptation becomes almost irresistible in another case

of failed mail service, where (as is the case here, and as it often is) the defendant is out of state and the only alternative to mail service is state long-arm service.

In at least one such instance, it was held that the improper use of mail service precludes that plaintiff from ever serving effectively out of state. Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 110 F.R.D. 4 (S.D. W.Va. 1985).

A more common result in that situation is to permit the out-of-state service under the Federal Rules. See, e.g. McDougald v. Jenson, 786 F.2d 1465, 1487 (11th Cir. 1986), cert denied 107 S.Ct. 207 (1986). But that ignores the territorial limitations of federal service, and now conflicts with this Court's Omni decision, as it did previously with the Second Circuit in Davis v. Musler, 713 F.2d 907, 913 (2d Cir. 1983).

A more sensible solution to this knotty problem was that of the Rhode Island District Court in an opinion that is not yet published, Pascalides v. Irwin Yacht and Marine Corp., 1988 U.S. Dist. LEXIS 64 (D. R.I. 1988). The Rhode Island Court noted (at 6) that "The Circuit Courts do not agree on [the question of state long-arm service after unsuccessful mail service]", proceeded to discuss the conflict, and then (at 7-8) described its own solution, already announced at a previous hearing:

> To avoid any confusion due to the second sentence of (C)(ii), . . . the Court determined that the first attempted service was completely invalid and that Irwin North was then free to make a fresh start at [state long-arm service] under 4(c)(2)(C)(i).

Although the Rhode Island service is not the most favorable to Rose (we would prefer a holding that Fultz was precluded from ever making proper out-of-state service), it seems to make sense. By first attempting federal mail service, Fultz in

effect shot an unloaded gun. It could not be effective in any event, so perhaps she should not be penalized for having chosen an option that was not open to her.

Furthermore, we are confident that Fultz has not yet satisfied the requirements for proper Colorado long-arm service. Out-of-state mail service is not available for a Colorado in personam action, and out-of-state substituted service is not available either. Colorado Rule 4(f)(1) governs out-of-state service here, and plainly requires delivery "to the person served" (App. A at 15a). At least four different Colorado commentators have unequivocally stated that this language precludes the substituted service that is available within Colorado under Colorado Rule 4(e)(1) (App. A at 14a).

We are not aware of any contrary authority. In the courts below, Fultz relied on a Colorado case that did not consider

the question (finding the service improper on other grounds), and an out-of-state case based on a similar long-arm jurisdiction statute, but a completely dissimilar service of process statute.

D. Review is Needed to Resolve the Conflict Between the Ninth Circuit and Other Circuits, on the Waiver of Jurisdictional Defects by "General Appearances" Not Covered in Rule 12.

The Ninth Circuit's decision (App. C at 43) is part of an unfortunate recent trend in that circuit, away from waiver analysis based on Rule 12, and back to the age-old distinction between general and special appearances.

We are not aware of any Supreme Court decision on the issue, but for decades the circuits (including the Ninth, until a few years ago) have recognized that the Federal Rules abolished that distinction.

After 50 years, it is time for the Supreme Court to speak, and to establish that the defenses specified in Rule 12

(such as the insufficiency of service of process relied on here by Rose) can be waived only as provided in Rule 12.

The Federal courts should not be permitted to develop a common law of waiver of lack of jurisdiction, any more than they are permitted to develop a common law of service of process. Just as Rule 4 spells out the rules of service, Rule 12 spells out the rules for the waiver of the defenses specified there.

Since the leading case of Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944), it has been established that "Rule 12 has abolished for federal courts the age-old distinction between general and special appearances."

2A Moore's Federal Practice (1986) paragraph 12.12 quotes that sentence from Orange Theatre, stating that "Special appearances are no longer necessary," [citing decisions from the Ninth Circuit and

five other circuit courts of appeals], and that "An appearance does not waive the objection of lack of jurisdiction over the person."

The decision here is not rendered harmless by the fact it is not to be published. It cites two published Ninth Circuit opinions, both of which also used a "general appearance" analysis.

Nor is there any guarantee that the aberration here can be confined to the Ninth Circuit. For a similar "analysis," see Broadcast Music, Inc. v. M.T.S. Enterprises, 811 F.2d 278, 281 (5th Cir. 1987). There the Fifth Circuit (as the Ninth Circuit does here) relied on a quotation from a Corpus Juris Secundum definitition of "Appearance", failing to recognize that that term can have different meanings in different contexts. See Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1546 n. 6 (D.C. Cir. 1987).

Here Rose's fatal error was in filing a postjudgment Rule 60 motion, without again raising in Colorado the jurisdictional cliam that he had already raised and lost in California. Under federal law of res judicata and collateral estoppel, Rose could not raise that issue again in Colorado, according to 1B Moore's Federal Practice (1984) paragraph 0.416[3]:

> The federal rlule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel, . . . [T]he judgment . . . is entitled to collateral estoppel effect, until reversed, vacated or modified. [Footnotes omitted].

Furthermore, Rose had to make his Rule 60 motion in Colorado when he did, which was on the last day of the one-year period specified for motions under 60(b)(1) and 60(b)(3).

Even under the pre-rules common law, our motion would not have waived jurisdiction. In Harkness v. Hyde, 98 U.S. 476,

479 (1878), as here, service had been made outside the jurisdiction of the trial court. It was held that the jurisdictional challenge was not lost by appearing specially to raise it, but then answering to the merits after the challenge had been erroneously overruled. If answering and defending the full case on the merits did not waive the challenge, then a fortiori our post-judgment Rule 60 motion did not do so either.

The decision here fails to recognize that this is a registration proceeding, so it does not even discuss the two-court problem inherent in that situation. It merely fashions a rule that jurisdiction must be challenged again in a second court, from cases that were not two-court cases at all.

Even if Rose's Colorado appearance waived his objections to jurisdiction, it does not necessarily moot the appeal.

If the waiver was not retroactive, the judgment is still void, and the Ninth Circuit should have reversed the contempt order and granted the motion to set the judgment aside. If the waiver was retroactive, the Ninth Circuit should have affirmed both orders of the California court.

But the retroactive waiver of a void judgment, by a postjudgment "general appearance", would violate due process. We are not aware of any federal law on that question, but a California court spoke eloquently, in In re Marriage of Smith, 135 Cal.App.3d 543, 549-50 (1982) (footnotes omitted):

> [The doctrine of "retroactive waiver" is] as fine an example as possible of . . . how unreflecting use of legal concepts leads to unintended results. The rule began as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a "general appearance," depriving unwary defendants ofl "'The fundamental requisite of due process of law .. the opportunity to be heard.'"

Rose's Colorado motion was not among the waiver situations listed in Rule 12. He has never filed a responsive pleading in any court, nor (except for his jurisdictional challenges) has he ever made any of the other motions listed in Rule 12.

The appeal is not moot.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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